Re Siti Hamidah bte Hamat; ex p K & N Kenanga Bhd

HIGH COURT (SHAH ALAM) — BANKRUPTCY NO 29–4011 OF 1998
SURIYADI J
15 MAY 2002

Bankruptcy *— Petition — Opposition to petition — Notice signed by judgment debtor's solicitor and not judgment debtor — Judgment debtor filed affidavit instead of Form 16 notice — Whether breach of mandatory rule — Whether defect curable — Whether petition could substitute as notice — Bankruptcy Rules 1969 rr 4, 117 & Form 16*

The judgment creditor filed a petition against the judgment debtor, but before it could be heard, the judgment debtor filed a notice to oppose it pursuant to r 117 of the Bankruptcy Rules 1969 ('the Rules'). The judgment creditor posed a preliminary objection at the hearing date that the notice was defective as it was signed by the judgment debtor's solicitor and not by the judgment debtor. The senior assistant registrar rejected the preliminary objection and the judgment creditor appealed. The judgment creditor relied upon *Development & Commercial Bank Bhd v Datuk Ong Kian Seng @ Ong Kin Cheang* [1995] 2 MLJ 724 stating that r 117 of the Rules provided that a debtor should file a Form 16 notice if they intended to show cause against the petition and a breach of a mandatory rule could not be cured. The crux of the matter was whether an affidavit affirmed by the judgment debtor, in opposition of the judgment creditor's petition, could substitute as a notice.

Held, rejecting the preliminary objection:

(1) The court agreed with *Datuk Ong Kian Seng* that a notice was a mandatory requirement to be adhered by an aggrieved party, with the affidavit as a poor cousin to a Form 16 notice. However, the court in that case was not confronted with the legal poser of whether the format of Form 16 was mandatory in nature, ie rejecting any variation, and which also had to be signed personally by the judgment debtor, not by the judgment debtor's solicitors (see p 708G–H).

(2) In this case, a notice in Form 16 was indeed lodged into court, in accordance with the requirements of r 117 of the Rules. Thus, the relevant mandatory rule was not breached by the judgment debtor and at no time was an affidavit adverted to in substitution of the prescribed notice of Form 16 (see pp 708I–709A); *Development & Commercial Bank Bhd v Datuk Ong Kian Seng @ Ong Kin Cheang* [1995] 2 MLJ 724 distinguished.

(3) Nothing was built into r 4, which stated that in the event a modified version was adverted to, that varied form may be construed as being defective or the intention of the notice be declared incompetent. It did not follow that every slight departure

therefrom shall taint the whole proceedings with a fatal blemish (see p 710B–C).

(4) The notice was the prescribed manner of alerting the petitioner of the judgment debtor's desire to oppose the judgment creditor's petition in court, restricted to issues supplied in the relevant documentations. With no deprivation of substantial rights or injury resulting from ignoring the rigid words of Form 16, and the purpose of the legislature could still be accomplished without adhering meticulously to the prescribed format and substantially obtaining the same results, then the format of Form 16 must be read as discretionary and not mandatory. No petitioner would assert that his interest would be prejudiced, just because the notice was signed by an advocate and not by the judgment debtor personally (see p 710E–F).

[Bahasa Malaysia summary

Pemiutang penghakiman telah memfailkan satu petisyen terhadap penghutang penghakiman, tetapi sebelum ia boleh didengar, penghutang penghakiman tersebut telah memfailkan satu notis untuk membangkangnya menurut k 117 Kaedah-Keadah Kebankrapan 1969 ('Kaedah-Kaedah tersebut'). Pemiutang penghakiman tersebut telah mengemukakan satu bantahan awal semasa tarikh perbicaraan tersebut bahawa notis tersebut adalah cacat kerana ia telah ditandatangani oleh peguam penghutang penghakiman tersebut dan bukan oleh penghutang penghakiman tersebut. Penolong kanan pendaftar telah menolak bantahan awal tersebut dan pemiutang penghakiman tersebut telah membuat rayuan. Pemiutang penghakiman tersebut telah bergantung kepada *Development & Commercial Bank Bhd v Datuk Ong Kian Seng @ Ong Kin Cheang* [1995] 2 MLJ 724 dengan menyatakan bahawa k 117 Kaedah-Kaedah tersebut memperuntukkan bahawa seorang penghutang hendaklah memfailkan satu notis Borang 16 sekiranya mereka berhasrat untuk menunjukkan sebab terhadap petisyen tersebut dan satu pelanggaran suatu kaedah madatori tidak boleh dipulihkan. Pokok persoalan adalah sama ada satu afidavit yang telah disahkan oleh penghutang penghakiman tersebut, yang membangkang petisyen pemiutang penghakiman tersebut, boleh digantikan sebagai satu notis.

Diputuskan, menolak bantahan awal tersebut:

(1) Mahkamah bersetuju dengan *Datuk Ong Kian Seng* bahawa satu notis adalah satu keperluan yang mandatori yang perlu dipatuhi oleh pihak yang terkilan, di mana satu afidavit tidaklah setanding satu notis Borang 16. Namun begitu, mahkamah dalam kes tersebut tidak berhadapan dengan persoalan undang-undang sama ada format Borang 16 adalah bersifat mandatori, iaitu dengan menolak apa-apa perubahan, dan juga sama ada ia mesti

ditandatangani sendiri oleh penghutang penghakiman tersebut, dan bukan peguam penghutang penghakiman tersebut (lihat ms 708G–H).

(2) Dalam kes ini, satu notis Borang 16 sememangnya telah dibuat di mahkamah, menurut keperluan k 117 Kaedah-Kaedah tersebut. Oleh itu, kaedah mandatori yang relevan tidak dilanggar oleh penghutang penghakiman tersebut dan tidak pada bila-bila masapun satu afidavit telah dirujuk bagi menggantikan notis Borang 16 yang ditetapkan (lihat ms 708I–709A); *Development & Commercial Bank Bhd v Datuk Ong Kian Seng @ Ong Kin Cheang*[1995] 2 MLJ 724 dibeza.

(3) Tiada apa-apa dalam k 4, yang menyatakan bahawa sekiranya satu versi pengubahsuaian telah dirujuk, maka bentuk yang berubah tersebut mungkin boleh ditafsirkan sebagai cacat atau niat notis tersebut diisytiharkan tidak kompeten. Maka ini tidak bermakna bahawa setiap penyimpangan yang sedikit akan mencemarkan keseluruhan prosiding dengan satu kecacatan yang memudaratkan (lihat ms 710B–C).

(4) Notis tersebut adalah dalam bentuk yang diperuntukkan untuk memaklumkan pempetisyen tentang niat penghutang penghakiman untuk membangkang petisyen pemiutang penghakiman tersebut di mahkamah, tertakluk kepada isu-isu yang terkandung dalam sebarang dokumen yang berkenaan. Tanpa sebarang perlucutan hak yang penting atau kerosakan yang diakibatkan daripada ketidakpatuhan perkataan-perkataan yang terkandung dalam Borang 16, dan dengan tujuan perundangan masih boleh dicapai tanpa mengikut dengan sepenuhnya bentuk format yang diperuntukkan dan masih memperolehi keputusan yang sama, maka format Borang 16 mestilah mengikut budibicara dan bukan mandatori. Tiada pempetisyen yang akan menegaskan kepentingannya akan diprejudiskan, hanya semata-mata kerana notis tersebut ditandatangani oleh peguam dan bukan penghutang penghakiman tersebut (see p 710E–F).]

Notes

For cases on opposition to petition, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1881–1895.

Cases referred to

Chin Sin Lan v Delta Finance Bhd [2002] 1 CLJ 266 (refd)

Development & Commercial Bank Bhd v Datuk Ong Kian Seng @ Ong Kin Cheang [1995] 2 MLJ 724 (distd)

Kamaruddin bin Mohamed v United Motor Works (M) Sdn Bhd [1982] 1 MLJ 126 (refd)

United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin [2001] 1 MLJ 561 (refd)

Legislation referred to

Bankruptcy Rules 1969 rr 4, 117
Rules of the High Court 1980 O 56 r 2

Taiyub Khan (*Inderjit Singh* with him) (*B Inderjit Singh*) for the appellant.
M Kalaichelvan (*Ashok K Raman* with him) (*Abu Talib Shahrom & Zahari*) for the respondent.

Suriyadi J: The judgment creditor ('JC') had filed a creditor's petition against the judgment debtor ('JD'), but before it could be heard, the JD had filed a notice to oppose it, pursuant to r 117 of the Bankruptcy Rules 1969 ('the Rules'). At the hearing date, the JC had posed a preliminary objection alleging that the notice, which was as per format 16, was defective as it had been signed by the JD's solicitor, thus breaching a mandatory requirement. The JC had alleged that the JD must sign the notice personally and nobody else. After hearing the preliminary objection, the senior assistant registrar had rejected it, and hence the appeal before me. To reiterate, after due concession by the JC, the only matter left for my consideration was the preliminary objection. At the end of the hearing, I had no hesitation in dismissing the appeal with costs. I now supply my reasons for the dismissal.

In the course of the hearing, the case of *Development & Commercial Bank Bhd v Datuk Ong Kian Seng @ Ong Kin Cheang* [1995] 2 MLJ 724 was brought to my attention by the JC, with particular reference to pp 731–732, where the Supreme Court remarked:

> ... r 117 clearly provides that if a debtor intends to show cause against the petition, he shall file a notice in Form 16. We hasten to add that no breach of a mandatory rule can be described as a formal defect or an irregularity that can be cured.

Having scrutinized the above case, it was obvious that the crux of the matter under discussion was whether an affidavit affirmed by the JD, in opposition of the creditor's petition could substitute as a notice. As it were, no notice in the likes of Form 16, provided for in the Rules was filed by the JD there. The Supreme Court, without more, after hearing the arguments of the JD, had pronounced that an affidavit in opposition could not qualify as a notice when challenging the validity of the bankruptcy petition. As said above, the court further held that a failure to file a notice supported by an affidavit under r 117 of the Rules, was not a mere defect that could be excused.

Having perused the case, I saw no reason to quarrel with the legal pronouncements, inter alia, that a notice was a mandatory requirement to be adhered by an aggrieved party, with the affidavit as a poor cousin to a Form 16 notice. I was also satisfied that at no time was the court confronted with the legal poser of whether the format of Form 16 was mandatory in nature, ie rejecting any variation, and which also had to be signed personally by the JD, not by the debtor's solicitors.

In a gist, the facts in *Datuk Ong Kian Seng* were distinguishable to the current one, in that here a notice in Form 16 was indeed lodged into court, in accordance with the requirements of r 117 of the Rules. That being so, at no time thus was the relevant mandatory rule breached by the JD. Also,

A at no time was an affidavit adverted to in substitution of the prescribed notice of Form 16. Thus the facts here were a far cry from the above case. What attracted the disaffection of the JC was that, even though a notice of opposition was indeed filed by the JD, that notice did not conform to the format of Form 16, in that it was signed by the latter's solicitor and not by herself personally. According to the JC, by virtue of the mandatory format, B it was thus encumbent upon the JD to personally endorse the said notice to oppose. Since she had not adhered stringently to the format, thus the document had become defective, and invariably turning her opposition incompetent.

To augment the above Supreme Court case, the JC industriously cited C the case of *Chin Sin Lan v Delta Finance Bhd* [2002] 1 CLJ 266 in which case the High Court there remarked:

> With regard to the first question, the said r 117 clearly stipulates that 'where a debtor intends to show cause against a petition, he shall file a notice with the registrar ...'. From the wording of the said rule, it is clear to me that Form 16 D must be made in the name of the debtor personally and not that of the advocate acting on his behalf. Although the said notice appeared to have been filed substantially in the format of Form 16, but *in my view it is still not in conformity with the requirements of the said r 117 as it was not issued in the name of the debtors personally.* (Emphasis added.)

Having perused pp 272–274 (the relevant portion of this poser), it was with E deep regret that I was unable to identify the premise of the above view, except for the phrase 'from the wording of the said rule'. As opposed to the brief reasoning, I was hard pressed to consider certain incontrovertible factors as discussed below.

By analogy, in the event an appeal was anticipated, Parliament had F promulgated under O 56 r 2 of the Rules of the High Court 1980 that Form 114 was to be alluded to. It was crystal clear even from a cursory reading of the provisions, that an appellant must allude to the correct format, due to it's elevated position. As compared to this scenario, r 117 of the Rules miserably failed to prescribe the format of the notice in the event an aggrieved party desired to oppose the petition. In a rather round about way, G it is only in Form 16, even that, in an oblique and passing manner that r 117 of the Rules is referred to.

Diluting further the supposed 'mandatory' format of Form 16, r 4 of the Rules in succinct terms provides:

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> The forms in the appendix, where applicable, and where they are not applicable, forms of the like character, with such variations as circumstances may require shall be used. Where such forms are applicable any costs occasioned by the use of any other or more prolix forms shall be borne by or disallowed to the party using the same unless the court shall otherwise direct.

I As regards the proforma of forms, Abdul Hamid FCJ in *Kamaruddin bin Mohamed v United Motor Works (M) Sdn Bhd* [1982] 1 MLJ 126 at p 128 in fact had occasion to opine:

> It needs no emphasis that they are recognized but it should be observed that proforma of forms to be used in bankruptcy proceedings is given in the appendix to the Bankruptcy Rules 1969, and be that as it may, these forms are intended to be used with modifications as may be necessary.

Rule 4 of the Rules surely, without requiring an in depth discourse of it, in all its clarity provides that whenever the forms in the appendix are adverted to, variations, as circumstances may require, may be permitted. Nothing is built into the said r 4 of the Rules, which states that in the event a modified version is adverted to, that varied form may be construed as being defective or the intention of the notice be declared incompetent. Viewing the matter from a different angle, it is fair to say that even though all laws are mandatory in the sense that they impose the duty of obedience on those who come within their purview, it does not follow that every slight departure therefrom shall taint the whole proceedings with a fatal blemish.

In matters of procedure, it is generally accepted that a statutory requirement may be interpreted as mandatory if it confers upon a litigant a substantial right, the violation of which will injure him or prejudice his case. At the other end, a statutory provision regulating a matter of practice or procedure will generally be read as discretionary, when the disregard of it, or the failure to follow it exactly will not materially prejudice a litigant's case or deprive him of a substantial right (*Bhindra's Interpretation of Statute* (7th Ed)). Applying the above universal view vis-a-vis, the notice at hand as mandated by r 117 of the Rules, it cannot be denied that it is the prescribed manner of alerting the petitioner of the JD's desire to oppose the creditor's petition in court, restricted to issues supplied in the relevant documentations. Does it matter who signs the notice, so long as the JC has been alerted? With no deprivation of substantial rights or injury resulting from ignoring the rigid words of Form 16, and the purpose of the legislature can still be accomplished, ie the petitioner satisfactorily alerted, without adhering meticulously to the prescribed format and substantially obtaining the same results, then the format of Form 16 must be read as discretionary and not mandatory. In the circumstances of the case, no petitioner would care to assert that his interest would be prejudiced, just because the notice was signed by an advocate and not by the JD personally.

I had to bear in mind too that under the Bankruptcy Act 1967, when a person is adjudged a bankrupt, his estate would vest on the official assignee. Thereafter, any statutorily imposed dealings that are connected to the bankrupt person would require the prior official approval of the official assignee. In the current case, as the JD was yet to be declared a bankrupt, and thus status wise no different to the next person, I found no legal impediment in existence that could justify the prevention of the JD permitting counsel to sign the impugned form. Members of the honourable society will rue the day when their signatures will be construed as not good enough to carry the day, when fulfilling their representative duty on behalf of their clients in like circumstances.

Additionally, in the event the JD were to be prevented from giving notice of her intention to oppose the creditor's petition, the repercussion to

her would be quite catastrophic, due to the quasi criminal effect of a bankruptcy order. To deprive her of the right to contest the creditor's petition merely on technical grounds, surely would rebel against common sense and 'the administration of civil justices (*United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin* [2001] 1 MLJ 561). To wind up the matter, in a situation like this, without involving any new canon of construction, the format must be strictly construed in favour of the person most aggrieved by the outcome.

At the end of the hearing, I had no compunction in rejecting the preliminary objection of the JC with costs.

Preliminary objection rejected.

Reported by Chew Phye Ken